

[Cite as *State v. Martinez*, 2015-Ohio-1293.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101474

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JACQUELINE MARTINEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-555317-A

BEFORE: Jones, P.J., E.A. Gallagher, J., and McCormack, J.

RELEASED AND JOURNALIZED: April 2, 2015

ATTORNEY FOR APPELLANT

Christina M. Joliat
P.O. Box 391531
Solon, Ohio 44139

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Anthony Thomas Miranda
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant, Jacqueline Martinez, appeals her conviction for felonious assault. We affirm.

I. Procedural History

{¶2} The record reflects the following facts. On October 6, 2011, Martinez's sister got into an altercation with a neighbor, Tiffany Taylor, on Taylor's front porch. Martinez, who lived down the street from Taylor, had purchased a gun a few weeks prior to the incident.

{¶3} At some point during her sister's altercation with Taylor, Martinez fired three to five shots from her house towards Taylor's house. Martinez claimed she was firing warning shots. One of the bullets struck an innocent bystander, Wanda Garrison, in the eye as she let her cat out of her house. Garrison lost sight in her right eye and underwent extensive reconstructive surgery.

{¶4} Martinez was arrested and charged with four counts of felonious assault, one count of improperly discharging into a habitation, and three counts of endangering children. The trial court referred Martinez to the court psychiatric clinic for a mental health examination to determine her competency to stand trial. In a report dated January 3, 2012, Dr. Bethany Young-Lundquist concluded that further evaluation was necessary to determine whether Martinez was competent to stand trial and recommended a "20-day inpatient competence to stand trial evaluation" so Martinez could be "observed more fully."

{¶5} The trial court ordered the 20-day inpatient evaluation. In a report dated February 21, 2012, Dr. Alice Cook opined that Martinez was competent to stand trial.

{¶6} The trial court held a competency hearing in March 2012. The docket indicates that the parties stipulated to the January 3, 2012 report, but does not indicate whether the parties stipulated to the February 21, 2012 report.

{¶7} In April 2012, Martinez pleaded guilty to one count of felonious assault with a three-year firearm specification and the trial court sentenced her to a total of eight years in prison.

{¶8} In 2014, Martinez filed a motion for a delayed appeal, which this court granted. In her appeal, Martinez raises the following assignments of error:

I: Jacqueline Martinez's guilty plea was not knowing, voluntary and intelligent.

II: Jacqueline Martinez received ineffective assistance of counsel as counsel did not enter a written NGRI plea on her behalf.

III: Jacqueline Martinez was improperly sentenced as the trial court failed to properly consider the purposes and principles of felony sentencing.

II. Law and Analysis

{¶9} In the first assignment of error, Martinez claims that her guilty plea was not knowingly, voluntarily, and intelligently made.

{¶10} Crim.R. 11(C) governs the process by which a trial court must inform a defendant of certain constitutional and nonconstitutional rights before accepting a felony plea of guilty or no contest. The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent

decision regarding whether to plead guilty. *State v. Schmick*, 8th Dist. Cuyahoga No. 95210, 2011-Ohio-2263, ¶ 5.

{¶11} To ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C)(2). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C)(2) requires that a trial court determine from a colloquy with the defendant whether the defendant understands (1) the nature of the charge and maximum penalty, (2) the effect of the guilty plea, and (3) the constitutional rights waived by pleading guilty.

{¶12} A trial court must strictly comply with the requirements that relate to the waiver of constitutional rights under Crim.R. 11(C)(2)(c). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. Thus, under the more stringent standard for constitutionally protected rights, a trial court's acceptance of a guilty plea will be affirmed only if the trial court engaged in meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights "in a manner reasonably intelligible to that defendant." *Id.* at ¶ 27, citing *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981).

{¶13} With respect to the nonconstitutional requirements of Crim.R. 11, set forth in Crim.R. 11(C)(2)(a) and (b), a reviewing court will consider whether there was "substantial compliance" with the rule. *Veney* at ¶ 14-17. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands

the implications of his or her plea and the rights he or she is waiving. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). “[I]f it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court’s error, there is still substantial compliance.” *State v. Caplinger*, 105 Ohio App.3d 567, 572, 664 N.E.2d 959 (4th Dist.1995). Further, a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the plea colloquy are at issue. *Veney* at ¶ 17. Crim.R. 11(C)(2)(a) requires the court to determine that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved. Therefore, a trial court must substantially comply with this requirement.

{¶14} In the case at bar, our review of the record shows that the trial court adhered to the requirements of Crim.R. 11. During the plea colloquy, Martinez affirmatively expressed that she understood her rights and that she was giving up those rights by entering a guilty plea. The trial court explained the offenses to Martinez, informed her of the maximum time she could receive, and explained to her the sentencing range for the offenses to which she was pleading guilty.

{¶15} On appeal, Martinez argues that she was not competent at the time she entered the guilty plea. To support this claim, she refers to the trial court docket, which states that her attorney stipulated to the January 3, 2012 court psychiatric report at her competency hearing, but does not show that her counsel stipulated to the February 21, 2012 competency report, the only report that found her competent to stand trial. Because

her counsel never stipulated to Dr. Cook's finding of competence, Martinez claims that she was not competent to enter her guilty plea and her plea was not in compliance with Crim.R. 11. We disagree.

{¶16} This court was not provided with a transcript from the competency hearing held on March 7, 2012. In Ohio, the appellant has the duty to file the transcript or such parts of the transcript that are necessary for evaluating the trial court's decision. App.R. 9(B); *State v. Peterson*, 8th Dist. Cuyahoga No. 96958, 2012-Ohio-87, ¶ 7. Failure to file the transcript prevents an appellate court from reviewing an appellant's assignments of error. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648, ¶13. Thus, absent a transcript or alternative record under App.R. 9(C) or (D) if a transcript from the competency hearing does not exist, we must presume regularity in the proceedings below. *State v. Lababidi*, 8th Dist. Cuyahoga No. 96755, 2012-Ohio-267, ¶ 13; *State v. Rice*, 8th Dist. Cuyahoga No. 95100, 2011-Ohio-1929.

{¶17} Martinez has provided this court the transcript from the plea and sentencing hearings, but not the transcript from the competency hearing. Although the docket indicates that the parties stipulated to the January 3, 2012 court psychiatric clinic report at the March 7, 2012 competency hearing, Martinez has not provided a transcript from that hearing to indicate whether the parties also stipulated to the February 21, 2012 competency report. Therefore, we presume regularity with the proceedings below. We also note that neither Martinez nor her counsel raised the issue of her competency during her plea hearing. In light of these facts, her argument that she was not competent during

her plea hearing is without foundation or merit.

{¶18} After review, we conclude that Martinez's plea hearing complied with Crim.R. 11 in all respects. Therefore, the first assignment is overruled.

{¶19} In the second assignment of error, Martinez claims that she was afforded ineffective assistance of counsel because her trial counsel did not enter a not guilty by reason of insanity ("NGRI") plea on her behalf.

{¶20} In order to establish a claim of ineffective assistance of counsel, Martinez must prove (1) her counsel was deficient in some aspect of representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶21} In Ohio, every properly licensed attorney is presumed to be competent, and therefore, a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶22} Martinez has not shown deficient performance by counsel. When the results of her first competency evaluation were inconclusive, her trial counsel sought another evaluation. The second evaluation concluded that Martinez was competent to stand trial. While competency to stand trial and sanity at the time of the act are two separate concepts, there is no evidence that Martinez did not know the wrongfulness of her conduct in this case.

{¶23} Additionally, Martinez cannot show prejudice because there is no evidence

that she would have been found not guilty by reason of insanity if her attorney had pursued that plea. “The failure to do a futile act cannot be the basis for a claim of ineffective assistance of counsel, nor could such a failure be prejudicial.” *State v. Knox*, 8th Dist. Cuyahoga Nos. 98713 and 98805, 2013-Ohio-1662, ¶ 20, citing *State v. Ford*, 8th Dist. Cuyahoga Nos. 88946 and 88947, 2007-Ohio-5722, ¶ 9. There is nothing to suggest that a NGRI plea would have been successful in this case.

{¶24} Therefore, the second assignment of error is overruled.

{¶25} In the third assignment of error, Martinez challenges her eight-year prison sentence, arguing that the trial court sentenced her to an unduly harsh punishment without taking into consideration her mental health issues, her genuine remorse, and that she was not likely to reoffend if she remained compliant with her medication schedule.

{¶26} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court’s standard for review is not whether the sentencing court abused its discretion; rather, if this court “clearly and convincingly” finds that (1) “the record does not support the sentencing court’s findings under R.C. 2929.14(C)(4),” or that (2) “the sentence is otherwise contrary to law,” then we “may increase, reduce, or otherwise modify a sentence * * * or [a reviewing court] may vacate the sentence and remand the matter to the sentencing court for re-sentencing.”

{¶27} A sentence is not clearly and convincingly contrary to law “where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease

control, and sentences a defendant within the permissible statutory range.” *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18.

{¶28} R.C. 2929.11(A) provides that “[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” Under R.C. 2929.12(A), trial courts must consider a nonexhaustive list of factors, including the seriousness of the defendant’s conduct, the likelihood of recidivism, and “any other factors that are relevant to achieving those purposes and principles of sentencing.”

{¶29} Martinez claims the trial court failed to consider R.C. 2929.11 and 2929.12(A), but the record belies the claim; it is apparent that Martinez’s complaint is *how* the court interpreted those factors against her. During the sentencing hearing, the trial court acknowledged the purposes and principles of sentencing under R.C. 2929.11 and considered factors under R.C. 2929.12(A), such as Martinez’s lack of a criminal record, the seriousness of the crime, the fact that a firearm was involved, and her mental health. The court thus fulfilled its obligation under both R.C. 2929.11 and 2929.12 and the sentence cannot be considered contrary to law.

{¶30} A reviewing court cannot review the sentencing judge’s exercise of its discretion as “[t]he appellate court’s standard for review is not whether the sentencing

court abused its discretion.” R.C. 2953.08(G)(2); *State v. Akins*, 8th Dist. Cuyahoga No. 99478, 2013-Ohio-5023, ¶ 18; *State v. Thompson*, 8th Dist. Cuyahoga No. 99628, 2014-Ohio-202, ¶ 22. Martinez’s argument impermissibly intrudes into the realm of the sentencing court’s discretion; it is the sentencing judge whom has the “discretion to determine the weight to assign a particular statutory factor.” *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). We therefore have no jurisdiction to consider whether the court abused its discretion in how it applied the purposes and principles of felony sentencing in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. See *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 17.

{¶31} Having found that Martinez’s sentence is in accordance with law, the third assigned error is overruled.

{¶32} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and

TIM McCORMACK, J., CONCUR